market power raises a substantial risk to competition.[449] France Telecom argues that our affiliation standard should extend to all non-equity alliances.[450] In petitions for reconsideration of the *Foreign Carrier Entry Order*, MCI and BTNA propose that we adopt a requirement that non-equity business arrangements with foreign carriers be filed with the Commission within 30 days of their execution and impose competitive safeguards where necessary and appropriate.[451]

Discussion

221. The dominant carrier regulatory framework we adopt here is aimed at detecting and deterring anticompetitive behavior in the U.S. market by foreign carriers and their affiliated U.S. carriers. As discussed below, we conclude that we should retain a single-tier dominant carrier regulatory approach and classify any U.S.-licensed carrier as dominant on a particular route if it is affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end of that route. We remove existing requirements that are unnecessarily burdensome and adopt a narrowly tailored dominant carrier framework designed to address specific concerns of anticompetitive behavior. We decline to adopt the restrictions on changes in capacity or service options that were proposed as supplemental safeguards, although we may impose them in the future as remedial measures in the event that we find evidence of anticompetitive conduct. The regulatory framework we adopt here allows the Commission to monitor and detect anticompetitive behavior while limiting the regulatory burden imposed generally on foreign-affiliated U.S. carriers.

222. We modify the safeguards we apply to U.S. carriers classified as dominant due to an affiliation with a foreign carrier that has market power in a relevant market as follows: we replace the fourteen-day advance notice tariff filing requirement with a one-day advance notice requirement and accord these tariff filings a presumption of lawfulness; we remove the prior approval requirement for circuit additions or discontinuances on the dominant route; we require a limited form of structural separation between a U.S. carrier and its foreign affiliate; we retain our quarterly traffic and revenue reporting requirement; we replace our provisioning and maintenance recordkeeping requirement with a quarterly reporting requirement that summarizes the provisioning and maintenance services provided by the foreign affiliate; and we adopt a quarterly circuit status report. We decline to adopt our proposal to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information.[452]

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[449] *See* Sprint Comments at 20 n.24; PanAmSat Comments at 5-6; AT&T Comments at 43 n.76; AT&T Reply Comments at 16 n.23.

[450] *See* FT Comments at 26.

[451] MCI Telecommunications Corporation Petition for Reconsideration at 3-7 (IB Docket No. 95-22); BT North America Inc. Petition for Reconsideration at 5-7 (IB Docket No. 95-22).

[452] These activities do not fall within the scope of activities covered by our No Special Concessions rule. As discussed above, however, we adopt specific rules governing the use of foreign-derived U.S. customer proprietary network information. *See supra* Sections V.B.1, V.B.2.b.

223. As we noted above, we retain the greater than 25 percent ownership affiliation standard that we adopted in the *Foreign Carrier Entry Order*.[453] Although Sprint questions our affiliation standard, we generally agree that "[a]s investment increases, not only does the incentive to discriminate increase, but also the means to accomplish such discrimination."[454] We reiterate our finding that the greater than 25 percent affiliation standard represents a level of investment that allows a carrier to provide substantial influence with regard to, and to reap substantial rewards from, anticompetitive conduct.[455] The safeguards we adopt here are designed to address this heightened incentive and ability of a foreign carrier with market power and its affiliated U.S. carrier to engage in anticompetitive behavior.

224. We also adopt the tentative conclusion in the *Notice*[456] that we should continue our current regulatory treatment of co-marketing and other non-equity business arrangements between U.S. carriers and their foreign counterparts that affect the provision of U.S. basic international services.[457] We agree with the comments of AT&T, Sprint, and PanAmSat that we should apply dominant carrier regulation to a U.S. carrier's provision of service on a particular route where a co-marketing agreement or other non-equity arrangement with a foreign carrier with market power presents a substantial risk of anticompetitive harm in the U.S. international market.[458] We decline to adopt the proposal by France Telecom to subject all non-equity alliances to "at least the same scrutiny and safeguards and any other conditions as are applied to equity alliances."[459] We find that applying dominant classification to all non-equity arrangements, absent a finding of substantial risk of competitive harm, would impose an unnecessary burden.[460] We also decline to adopt a filing requirement for non-equity business relationships as proposed by MCI and BTNA in their petitions for reconsideration in the *Foreign*

[453] *See supra* note 360.

[454] Sprint Comments at 20.

[455] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3904 ¶ 83.

[456] *See Notice* ¶ 86.

[457] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3969-70 ¶ 253.

[458] *See* AT&T Comments at 43 n.76; Sprint Comments at 20 n.24; PanAmSat Comments at 5-6.

[459] FT Comments at 26.

[460] The incentives to discriminate are not as great as they are in an affiliated or fully integrated relationship. As we concluded in the *Foreign Carrier Entry Order*, "the incentives for collusive conduct by allied carriers are more attenuated than is the case for equity investments in a U.S. carrier by a foreign carrier. Non-equity arrangements can provide a financial incentive for carriers to act jointly in the pursuit of marketing objectives, but neither carrier derives a direct financial benefit with respect to the other's telecommunications operations." *Foreign Carrier Entry Order*, 11 FCC Rcd at 3909 ¶ 95.

Carrier Entry Order proceeding.[461] We agree with AT&T that any such filing requirement would be extremely broad and would have little potential impact on competition.[462] We expect the number of those arrangements to increase and the potential harm to competition to decrease as countries begin to liberalize their telecommunications markets. Some of the non-equity business relationships that concern MCI and BTNA, moreover, must be reported pursuant to Section 43.51 of our rules.[463] We anticipate that, if a particular arrangement not covered by Section 43.51 presents a serious risk to competition, other carriers will bring the arrangement to our attention, and, pursuant to Section 218 of the Act,[464] we could require the filing of any information necessary to review the participating U.S. carrier's regulatory status.

225. Given the heightened risks of anticompetitive behavior associated with affiliated carrier dealings, we conclude that, in addition to the No Special Concessions rule and the benchmark condition, further safeguards are warranted where a U.S. carrier is affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end of a particular route.[465] These further safeguards, we find, should allow the Commission to monitor and detect anticompetitive behavior without imposing unnecessarily burdensome regulation on a U.S. carrier's provision of service due to its affiliation with a foreign carrier. We thus adopt an approach that in large part relies on reporting requirements, rather than restrictions on capacity changes or service options, to prevent affiliated carriers from causing competitive harms in the U.S. market.

226. Some of the reporting requirements we adopt are similar in nature to requirements the Commission has applied in the domestic context to carriers with market power. As part of the *Computer III* proceeding, for example, the Commission required AT&T and the Bell Operating Companies (BOCs) to file quarterly nondiscrimination reports with regard to the underlying basic services they provide to their own enhanced service offerings in comparison with the basic services they make available to their competitors in the enhanced services market.[466] In the U.S. international

[461] *See* MCI Telecommunications Corporation Petition for Reconsideration at 3-7 (IB Docket No. 95-22); BT North America Inc. Petition for Reconsideration at 5-7 (IB Docket No. 95-22).

[462] AT&T Corp. Opposition to Petitions for Reconsideration at 13-14 (IB Docket No. 95-22).

[463] *See* 47 C.F.R. § 43.51. For example, a non-equity agreement may contain the terms of an operating agreement for the U.S. partner's provision of U.S. international common carrier services in correspondence with its foreign partners.

[464] 47 U.S.C. § 218.

[465] For a discussion of market power and relevant markets, see *supra* ¶¶ 144-145.

[466] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, 1055 ¶ 192 (1986), *on recon.*, 2 FCC Rcd 3035 (1987), *on further recon.*, 3 FCC Rcd 1135 (1988), *on second further recon.*, 4 FCC Rcd 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("[W]e seek to ensure that the BOCs or AT&T do not discriminate in favor of their own operations or their own customers in

services context, we are similarly concerned that a foreign carrier with market power in a relevant market on the foreign end of a particular route will favor its U.S. affiliate to the detriment of unaffiliated U.S. carriers and U.S. consumers. We assert our jurisdiction over the U.S. affiliates of these foreign carriers and require these U.S. carriers to file reports that allow the Commission and others to determine whether they receive favorable treatment at the expense of unaffiliated U.S. carriers. Consistent with this approach, we also require these U.S. affiliates to file other reports that indicate whether they are engaging in anticompetitive behavior that affects traffic or revenues to or from the United States.

227. We decline to adopt a supplemental tier of dominant carrier safeguards that would apply to U.S. carriers affiliated with foreign carriers that do not face facilities-based competition on the foreign end of a particular route, as proposed in the *Notice*.[467] We are not convinced, as we initially proposed and as several U.S.-based carriers contend, that it is necessary to differentiate between a U.S. carrier that is affiliated with a foreign carrier that is a monopolist and one that possesses market power but faces some level of international facilities-based competition.[468] Both a monopolist and a foreign carrier with market power that faces some level of competition have the ability to engage in price and non-price discrimination against unaffiliated U.S. carriers. Although a monopolist may be able to cause a greater degree of competitive harm because it possesses greater market power, it cannot engage in a different kind of anticompetitive conduct. We find that the dominant carrier safeguards we adopt here, which include some of the reporting requirements proposed as supplemental safeguards, are necessary and sufficient to enable the Commission to detect and deter a foreign carrier from using its market power on the foreign end to benefit its affiliated U.S. carrier, regardless of whether the foreign carrier faces some level of competition in its home market or is a monopolist.

228. We do not adopt as part of our dominant carrier framework those safeguards that would restrict the service options or circuit capacity changes of U.S. carriers affiliated with foreign monopoly carriers. We concur with statements of the European Commission and Deutsche Telekom that such proscriptive measures may be overly burdensome, absent any finding of proven anticompetitive conduct.[469] We agree with several commenters,[470] however, that the Commission should retain authority to impose sanctions, including those restrictions proposed as supplemental safeguards, in the event we find evidence of anticompetitive conduct.[471]

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providing underlying basic services.").

[467] *See Notice* ¶¶ 104-110.

[468] *See* AT&T Comments at 48; MCI Comments at 4-8; Sprint Comments at 20; WorldCom Comments at 11; PanAmSat Comments at 4.

[469] *See* European Commission Comments at 6; DT Comments at 26.

[470] *See* C&W Reply Comments at 9; NTT Reply Comments at 3; BTNA Comments at 3-4; GTE Reply Comments at 29.

[471] *See infra* Section V.D.

229. We also are not persuaded by AT&T that we should apply a supplemental tier of safeguards to U.S. carriers that are affiliated with foreign carriers with market power unless the destination country not only has authorized multiple facilities-based competitors but also has fully implemented the Reference Paper and allows foreign entities to hold controlling interests in telecommunications carriers.[472] Nor are we convinced by Sprint that we should apply a supplemental tier unless there is some international competition taking place in the foreign market.[473] We find that the No Special Concessions rule and the dominant carrier safeguards we adopt here are tailored to enable the Commission to prevent the exercise of foreign market power in the U.S. market, regardless of the nature of the foreign regulatory regime or the level of foreign investment permitted. We note, however, that if a foreign country does not fulfill its commitments to the WTO Basic Telecom Agreement, the United States may file a complaint in the WTO dispute settlement process.

230. We adopt our tentative conclusion that we generally should not consider the effectiveness of foreign regulation as a separate matter when making a determination of a foreign-affiliated carrier's regulatory classification.[474] We are not persuaded by AT&T that the benefits derived from such evaluations outweigh the costs incurred.[475] We agree with Sprint that such attempts at evaluating the effectiveness of regulation in a foreign market impose significant burdens on the Commission and on applicants.[476] Our experience has shown that obtaining sufficiently reliable and timely information about a foreign regulatory regime is a difficult, resource-intensive, and time-consuming process. We find that the delay inherent in such a process would slow entry into our markets and the attendant benefits to our consumers. As a result, we conclude that we will apply dominant carrier regulation to all foreign-affiliated carriers on routes where their affiliates have market power, without conducting a separate analysis of the effectiveness of a foreign country's regulatory regime. In making a foreign market power determination, however, we will consider the presence and degree of barriers to entry or expansion, which may relate to the foreign regulatory regime.[477]

231. We adopt the proposal in the *Notice* to continue to classify any U.S. international carrier — whether U.S.- or foreign-owned — as dominant on a route where it is affiliated with a foreign carrier that has sufficient market power in a relevant market on the foreign end to affect competition

[472] *See* AT&T Comments at 44, 49.

[473] *See* Sprint Comments at 21.

[474] *See Notice* ¶ 87.

[475] *See* AT&T Reply Comments at 40 n.67.

[476] *See* Sprint Comments at 21-22.

[477] This approach applies to all foreign market power determinations, including those that are conducted as part of the No Special Concessions rule. *See supra* Section V.B.1.

adversely in the U.S. market.[478] We decline to adopt MCI's proposal to apply dominant carrier safeguards as a strong presumption that could be rebutted "by a clear demonstration that competitive distortion in the U.S. market would not occur."[479] Rather, if a carrier demonstrates that its foreign affiliate lacks market power on the foreign end, we will classify the U.S. carrier as non-dominant on that route.

232. As we discussed in the No Special Concessions section above, we believe that it is appropriate to adopt a rebuttable presumption to identify a category of foreign carriers that do not possess market power in any relevant market on the foreign end of an international route and, as a result, lack the ability to affect competition adversely in the U.S. market.[480] As we determined above, we find that carriers with less than 50 percent market share in each of the relevant markets on the foreign end generally do not present a substantial risk of harm in the U.S. market.[481] We therefore adopt a rebuttable presumption that a U.S. affiliate of a foreign carrier with less than 50 percent market share in each of the relevant markets on the foreign end of a particular route should not be subject to dominant carrier safeguards on the affiliated route.[482]

233. This presumption of non-dominance is rebuttable. The Commission will entertain petitions to demonstrate that a foreign carrier with less than 50 percent market share has the ability — either unilaterally or in concert with other carriers — to distort the U.S. international services market, and its U.S. affiliate should be classified as dominant. Likewise, parties may make a showing that a foreign carrier with a market share of 50 percent or more in a relevant market does not have sufficient market power to harm competition and consumers in the U.S. market and its U.S. affiliate therefore should be classified as non-dominant. We will review such petitions under an appropriate economic analysis of market power.[483]

234. We find unpersuasive the claims by some commenters that dominant carrier safeguards are unnecessary. Deutsche Telekom and Cable & Wireless, for example, assert that safeguards are not needed because the *Notice* does not cite one case in which the Commission determined that a foreign-

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[478] As noted above, the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See supra* ¶ 145.

[479] MCI Comments at 5.

[480] *See supra* ¶ 161.

[481] *See id.*

[482] We will allow those foreign-affiliated carriers currently authorized under Section 214 and classified as dominant to file petitions to demonstrate that, pursuant to the presumption, they should be classified as non-dominant.

[483] *See supra* note 317.

affiliated carrier engaged in anticompetitive conduct.[484] This argument fails to acknowledge that our existing dominant carrier safeguards, in conjunction with the *Foreign Carrier Entry Order*'s effective competitive opportunities (ECO) entry standard,[485] have prevented the leveraging of foreign market power into the U.S. market. Furthermore, it disregards the fact that we have imposed additional conditions on particular U.S. carriers whose equity relationships with foreign carriers presented a heightened risk of anticompetitive behavior.[486] Instead, we agree with the comments of the European Commission, which state that "the European Community and its Member States consider legitimate the classification of a carrier as dominant in order to impose further obligations" to prevent competitive harms in the U.S. market.[487] The European Commission further notes that the Reference Paper expressly allows WTO Member countries to impose obligations "on carriers who are a major supplier."[488] We are not persuaded by Telia NA that the growing number of competitors, the increasingly global nature of the market, or the relative size of foreign-affiliated carriers should diminish our finding that dominant carrier safeguards are warranted where the foreign affiliate has sufficient market power to affect competition adversely in the U.S. market.[489]

235. We conclude that our dominant carrier safeguards are necessary to complement and support other Commission rules designed to address anticompetitive behavior. Deutsche Telekom and GTE assert that the International Settlements Policy and the *Flexibility Order* adequately address our concerns regarding competitive harms in the U.S. international market.[490] Cable & Wireless argues against retaining dominant carrier safeguards, asserting that even if a foreign carrier were to route excessive return traffic to its U.S. affiliate, its actions "would be totally obvious to everyone on the

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[484] *See* DT Comments at 22; *see also* C&W Comments at 5; C&W Reply Comments at 3.

[485] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3989-94 ¶¶ 40-55.

[486] *See, e.g.*, *Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996); *see also MCI Communications Corporation, British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994) (classifying MCI as non-dominant on the U.S.-U.K. route but imposing specific safeguards on MCI as a result of the 20 percent investment by British Telecommunications plc).

[487] European Commission Comments at 5.

[488] *See id.* at 5. The Reference Paper defines "major supplier" as "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market."

[489] *See* Telia NA Reply Comments at 10-11.

[490] *See* DT Comments at 22-23; GTE Comments at 4.

route . . . [and] would be brought to the attention of the Commission."[491] Such improper routing of traffic, however, would be transparent to all parties and more readily detected because we currently require dominant foreign-affiliated carriers to file quarterly traffic and revenue reports.[492] Our procompetitive policies such as the *Flexibility Order* rely on reporting requirements to establish a record of evidence available to the Commission as it monitors against competitive harms. With less timely reports, our ability to detect and deter such conduct would be significantly curtailed.

236. We also are not persuaded by Deutsche Telekom's claim that the Commission should eliminate all dominant carrier safeguards for U.S. affiliates of foreign carriers from WTO Member countries where the settlement rate is within the benchmark range.[493] Rather, we agree with Sprint and AT&T that achievement of settlement rates does not address all forms of anticompetitive conduct, such as non-price discrimination, that our dominant carrier safeguards are intended to address.[494]

237. We also decline to adopt the proposition by several commenters that dominant carrier safeguards are unnecessary given the WTO Basic Telecom Agreement and foreign countries' commitments to the procompetitive principles of the Reference Paper.[495] Telia NA, for example, states that the WTO Agreement will enable U.S. carriers to bypass incumbent foreign carriers, "either by corresponding with new entrants . . . or entering these markets themselves and providing end-to-end service through self-correspondence."[496] These options, Telia NA argues, will eliminate the ability of foreign carriers to discriminate against U.S. carriers in the provision of gateway international transport circuits and gateway switching services and facilities. We fully expect that operating agreements with new entrants and self-correspondence will soon become a global market reality. We would not have committed to open our basic telecommunications markets otherwise. We conclude, however, that removal of foreign entry barriers alone will be insufficient to prevent foreign carriers with market power from seeking to leverage their market power into the U.S. market, especially in the short term. The Reference Paper, moreover, expressly provides that governments have the right to adopt rules to prevent anticompetitive behavior by carriers that, alone or together, control "essential facilities or otherwise have the ability to affect the market adversely."[497] We adopt our open entry policy for

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[491] C&W Comments at 5.

[492] *See* 47 C.F.R. § 63.10(c)(4). In its comments, Telefónica Internacional also states that violations of the International Settlements Policy would be detected by the dominant carrier quarterly traffic and revenue report. *See* Telefónica Internacional Comments at 15.

[493] *See* DT Comments at 30-31.

[494] *See* Sprint Comments at 26; AT&T Comments at 45-46; AT&T Reply Comments at 32-33.

[495] *See* DT Comments at 22-23; C&W Comments at 4-5; GTE Comments at 8-9; NTT Reply Comments at 3; Telia NA Reply Comments at 4.

[496] Telia NA Reply Comments at 4.

[497] Reference Paper, Section 1.1.

carriers from WTO Member countries with an understanding that the public interest mandates that we ensure against the leveraging of foreign market power into the U.S. market.

238. We fully expect that, as competitive conditions develop in foreign markets, the need for our dominant carrier safeguards may diminish. We therefore anticipate that in the future we will be able to modify some of our dominant carrier safeguards to reflect a more competitive environment.

239. We discuss below each of the competitive safeguards proposed in the *Notice* and decide which to adopt as part of our dominant carrier regulatory framework.

b. Competitive Safeguards

(i) Modified Tariffing Requirements

240. We proposed in the *Notice* to replace the fourteen-day advance notice period imposed on dominant foreign-affiliated U.S. carriers' international tariff filings with a one-day notice period and to accord such tariff filings a presumption of lawfulness.[498]

241. Telia NA asserts that the proposal to modify the tariffing requirement will benefit consumers by allowing carriers to respond promptly to competitive pressures by lowering prices.[499] PanAmSat opposes the proposal, asserting that it runs contrary to the fundamental purposes of the tariff filing requirement and that it will not provide benefits to competition.[500] In particular, PanAmSat asserts that one day's notice does not provide the public with an opportunity to comment nor does it provide the Commission a realistic opportunity to enforce the requirement that the carrier's rates be just, reasonable, and nondiscriminatory. It also claims that a presumption of lawfulness makes the burden of rebutting virtually impossible to sustain.

242. As part of the *Foreign Carrier Entry Order*, we modified the tariff filing requirements imposed on dominant foreign-affiliated carriers by adopting a fourteen-day advance notice period, consistent with the notice period governing non-dominant international carriers at that time.[501] We subsequently adopted a rule to allow non-dominant international carriers to file tariffs on one day's

[498] *See Notice* ¶ 94.

[499] *See* Telia NA Reply Comments at 10; *see also* European Commission Comments at 5; Sprint Comments at 20; GTE Comments at 20.

[500] *See* PanAmSat Comments at 3.

[501] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3974 ¶ 262.

notice.[502] We found that a one-day filing period would help accelerate the introduction of new international services.[503]

243. We recognize that retaining the existing tariff filing requirements possibly could constrain the ability of a dominant foreign-affiliated carrier to engage in anticompetitive conduct. Nevertheless, the fact that these requirements might help to deter anticompetitive behavior is not, by itself, sufficient to retain these measures. We should also consider whether and to what extent these regulations would dampen competition and whether other regulatory provisions accomplish the same objectives.[504]

244. We conclude here that retaining the fourteen-day notice period significantly inhibits a dominant foreign-affiliated carrier's incentive to reduce prices, because competitors can respond to pro-consumer price and service changes before the tariff would become effective.[505] We agree with those commenters that contend that a one-day notice period, coupled with a presumption of lawfulness, will provide carriers with additional flexibility to respond to customer demands.[506] To the extent that a foreign-affiliated carrier has the ability to engage in a predatory price squeeze, we find that the existence of a tariff filing requirement, regardless of the length of the advance notice, will serve to deter such behavior. These benefits, we find, outweigh the claims raised by PanAmSat.[507]

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502 *See Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 95-118, Report and Order, 11 FCC Rcd 12,884, 12,916 ¶ 80 (1996).

503 *See id.*

504 *Cf. LEC Regulatory Treatment Order* ¶¶ 87-89 (concluding that it is not necessary to impose an advance notice tariff filing requirement on BOC interLATA affiliates).

505 *See Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-96, Memorandum Opinion and Order, FCC 93-401, 8 FCC Rcd 6752, 6756 ¶ 21 (1993) (*Non-dominant Tariff Order*), *vacated in part* Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995), Order, 10 FCC Rcd 13653 (1995).

506 *See* GTE Comments at 18; European Commission Comments at 5; Telia NA Reply Comments at 3 & 10; MCI Reply Comments at 5; Sprint Comments at 20.

507 PanAmSat also claims that the difference between one and fourteen days has no meaningful impact on the effort required to file and maintain the tariff. *See* PanAmSat Comments at 3. Further, PanAmSat asserts, as long as rates are tariffed, carriers that are committed to engaging in tacit price coordination have the means to do so, regardless of whether the notice period is reduced from fourteen days to one day. Finally, PanAmSat disputes the tentative conclusion that a fourteen-day filing period encourages competitors to challenge a carrier's rates. *See id.* Regardless of the merits of these claims, however, we are not persuaded that they outweigh the benefits of reducing the notice period and providing dominant foreign-affiliated U.S. carriers with the ability to respond quickly to changes in the marketplace.

245. We find, moreover, that in the unlikely event that a foreign-affiliated dominant carrier files an unlawful tariff, remedial action can be taken after the tariff becomes effective. Aggrieved parties can avail themselves of the Commission's complaint process to seek a determination of the lawfulness of any tariff filing.[508] The Commission, on its own initiative, also may investigate any tariff to determine whether it is unlawful.[509] PanAmSat, furthermore, does not demonstrate why a presumption of lawfulness would make a challenge "virtually impossible to sustain." We therefore find that the existing tariffing safeguards are not necessary, and we adopt our proposal to allow dominant foreign-affiliated carriers to file tariffs on one-day's notice with a presumption of lawfulness.

(ii) Removal of Prior Approval of Circuit Additions and Discontinuances

246. We proposed in the *Notice* to eliminate the prior approval requirement for circuit additions and discontinuances from the basic dominant carrier safeguards framework and instead to require quarterly notification of circuit additions on the dominant route, specifying the joint owner of the circuit. We requested comment on whether the quarterly notification requirement should identify the particular facilities on which each circuit is added.[510] We proposed to retain the prior approval requirement, however, as a supplemental safeguard on a route where a U.S. carrier is affiliated with a foreign carrier that does not face international facilities-based competition.[511]

247. GTE, Cable & Wireless, and Telia NA observe that eliminating the prior approval requirement will benefit consumers by allowing carriers to respond promptly to competitive pressures through the addition of new or expanding services.[512] AT&T supports the proposal to eliminate the prior approval requirement as a basic dominant carrier safeguard, provided the Commission requires notification of *each* circuit addition or discontinuation on the dominant route, rather than a quarterly notification, as well as identification of the facility on which the circuit is added or discontinued.[513] Cable & Wireless and Telefónica Internacional oppose the proposal to retain the prior approval requirement as a supplemental safeguard, arguing that it would limit a foreign-affiliated carrier's ability to respond to customer demands and would place foreign-affiliated carriers at a significant disadvantage in the U.S. market.[514] Telefónica Internacional also claims that a prior approval

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[508] *See* 47 U.S.C. § 208.

[509] *See Non-dominant Tariff Order*, 8 FCC Rcd at 6756-57 ¶ 23.

[510] *See Notice* ¶ 96.

[511] *See id.* ¶ 107.

[512] *See* GTE Comments at 19-20; C&W Reply Comments at 8; Telia NA Reply Comments at 10; *see also* European Commission Comments at 5; Sprint Comments at 20.

[513] *See* AT&T Comments at 47; AT&T Reply Comments at 35.

[514] *See* C&W Comments at 7; Telefónica Internacional Comments at 14-15.; *see also* GTE Comments at 20.

requirement is a significant barrier to entry that is unnecessary given the Commission's other rules and policies.[515]

248. PanAmSat argues that elimination of the prior approval process would be premature, asserting that it "serves as an important tool permitting the Commission to monitor and detect, on a timely basis, deviations in traffic flows."[516] Reliance on reporting requirements, PanAmSat argues, would permit only after-the-fact remedies. WorldCom contends that the prior approval process is a meaningful safeguard that allows the Commission to monitor traffic and circuit growth and respond promptly to any anticompetitive behavior.[517]

249. We agree with PanAmSat and WorldCom that the prior approval requirement allows the Commission to monitor traffic and circuit growth and to respond to potential anticompetitive behavior before it occurs. On balance, however, we are persuaded by the comments of GTE that "quarterly reporting requirements," which we adopt below, will be "sufficient to allow the Commission to detect anticompetitive practices."[518] Replacing the prior approval rule with reporting requirements will allow us to monitor conduct while permitting carriers to respond promptly to developments in the global telecommunications market. We acknowledge that this approach limits our ability to address potential concerns in advance, but because our quarterly reports will provide a timely and running account of traffic and revenue, provisioning and maintenance, and circuit status,[519] we conclude that they will provide specific evidence of whether harms to competition and competitors have occurred in the U.S. market. We believe that the existence of a monitoring scheme, coupled with effective enforcement, will deter anticompetitive behavior. We find that a prior approval requirement, therefore, is not necessary absent evidence of anticompetitive behavior. Should we find evidence of anticompetitive conduct, however, we will consider imposing a prior approval requirement for circuit additions and discontinuances on the dominant route. We decline to adopt a quarterly notification of circuit additions or discontinuances requirement or AT&T's proposed circuit-by-circuit notification requirement, given the quarterly circuit status report and other safeguards we adopt below.

250. Although we eliminate our prior approval requirement here, we are concerned about the potential for concentration of capacity on U.S. international routes. This concern, however, extends to

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515 *See* Telefónica Internacional Comments at 15. In addition, Telefónica Internacional argues that Section 402(b)(2)(A) of the Act restricts the ability of the Commission to require prior approval to increase capacity. *See id.* at 5 n.10. We note that the Commission has sought comment on this issue in another proceeding. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, CC Docket No. 97-11, Notice of Proposed Rulemaking, FCC 97-6 (rel. Jan. 13, 1997). Accordingly, this issue will be addressed in that proceeding.

516 PanAmSat Comments at 4.

517 *See* WorldCom Comments at 11.

518 GTE Comments at 20.

519 *See infra* Sections V.C.2.b.(iv)-(vi).

potential conduct by all U.S. international carriers, not just dominant foreign-affiliated carriers. We find that the prior approval requirement, which applies only to dominant foreign-affiliated carriers, is not the appropriate means to address this concern. We direct the International Bureau to study this issue further and recommend any rule changes it deems necessary.[520]

251. Finally, we requested comment in the *Notice* on whether we should continue to apply the prior approval requirement to dominant foreign-affiliated carriers that obtained their Section 214 authorization to serve a non-WTO Member country prior to adoption of the ECO test in the *Foreign Carrier Entry Order*.[521] As Cable & Wireless noted in its petition for reconsideration of that order, the ECO test applies to applications from dominant carriers when they seek to add circuits on their authorized dominant routes.[522] In its comments filed in this proceeding, Cable & Wireless asserts that any prior approval requirement "would hinder, not enhance, achievement of the Commission's goals in this proceeding."[523] Given the general policy we adopt here regarding existing carriers, we conclude that it would be unnecessarily onerous to require particular carriers to continue to seek prior approval. We thus find that it is in the public interest to allow these carriers to add or discontinue circuits without first obtaining prior approval. Of course, if we find that these affiliated carriers are engaged in anticompetitive behavior, we may apply the prior approval requirement on that route.

(iii) Separation Requirements

252. In the *Notice*, we sought comment on whether to adopt, as an additional dominant carrier safeguard, some level of structural separation between a U.S. carrier and its affiliated foreign carrier. We sought comment on whether the approach the Commission has taken either toward Bell operating company (BOC) or independent local exchange carrier (LEC) provision of in-region interexchange service is an appropriate model, or whether some other level of separation is appropriate.[524]

253. In the past, structural separation has been imposed on vertically integrated U.S. carriers that have control over an upstream input necessary for the provision of service in a downstream market. The 1996 Act imposes a detailed separation requirement on BOC provision of in-region interLATA service in Section 272 of the Act.[525] The Commission also imposed strict structural separation on AT&T and BOC provision of enhanced services under the *Computer II* regulatory

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[520] *See infra* ¶ 285.

[521] *See Notice* ¶ 97.

[522] C&W Comments at 8 n.11.

[523] *Id.*

[524] *Notice* ¶¶ 111-113.

[525] 47 U.S.C §§ 271, 272; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and FNPRM, 11 FCC Rcd 21,905 (1996) (*Non-Accounting Safeguards Order*).

regime.[526] The Commission imposed a lesser degree of structural separation on incumbent independent LEC provision of in-region interstate, domestic interexchange service in the *Competitive Carrier Fifth Report and Order* in order for such LECs to qualify for non-dominant treatment.[527] The Commission recently amended its rules to require all incumbent independent LECs to provide domestic interstate interexchange and international service originating in the LEC's local exchange service areas to comply with the *Fifth Report and Order* separation requirements, with minor modifications.[528] Finally, the Commission recently affirmed the importance of a similar level of separation in the *LEC/CMRS Safeguards Order*, governing LEC in-region provision of commercial mobile radio service (CMRS).[529]

254. Our adoption of separation requirements in each of those proceedings addressed the risk that a U.S. carrier would be able to use its market power in an upstream market in the United States (*i.e.*, local exchange and exchange access services) to harm competition in the downstream market (*e.g.*, enhanced services, domestic and international interexchange services, or commercial mobile radio service). These safeguards aid in the prevention and detection of anticompetitive conduct in the downstream market.[530] We are concerned in this proceeding that a foreign carrier that possesses market power in a relevant market on the foreign end of an international route could leverage its market power into the downstream U.S. international services market.

255. The Commission has generally applied structural separation to address discriminatory provision of service, cost misallocation, and the possibility of a predatory price squeeze.[531] For incumbent independent LEC provision of domestic interstate interexchange and international service,

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[526] Under *Computer II*, AT&T, and later the BOCs, were required to provide enhanced services through a separate affiliate. *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (*Computer II Final Order*), *recon.*, 84 FCC 2d 50 (*Computer II Recon. Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Recon. Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). Upon divestiture, this requirement was extended to the BOCs. *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d 1117 (1983) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984).

[527] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report and Order*).

[528] *See LEC Regulatory Treatment Order* ¶¶ 144-175; *see infra* ¶ 255.

[529] *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, FCC 97-352 ¶¶ 37-63 (rel. Oct. 3, 1997) (*LEC/CMRS Safeguards Order*).

[530] *LEC Regulatory Treatment Order* ¶ 163.

[531] *Id.* ¶¶ 159-162; *see also Fifth Report and Order*, 98 FCC 2d at 1198.

the Commission imposes a minimal level of separation in order to guard against harms to consumers, competition and production efficiency.[532] In the *LEC Regulatory Treatment Order*, the Commission required such carriers to provide these services through separate corporate affiliates that maintain separate books of account, do not jointly own switching and transmission facilities with their affiliated LECs, and acquire any services from the affiliated LECs at tariffed rates, terms, and conditions, or pursuant to an interconnection agreement negotiated pursuant to Section 251 of the Act.[533] The Commission also imposed a similar level of separation on incumbent LEC provision of in-region CMRS.[534]

256. Several parties responded to our request for comment with varying degrees of specificity. AT&T, the Telecommunications Resellers Association and PanAmSat support imposing structural separation.[535] AT&T supports a high level of separation for "supplemental dominant" carriers, urging the Commission to require separate officers, directors and employees in order to assist in "identifying cost misallocation and cross subsidization."[536] Sprint also supports a more limited structural separation, one that is based on existing international borders.[537] A number of commenters support imposing structural separation only as a remedial measure and in limited circumstances.[538] Others oppose requiring any form of structural separation on the basis that it would "impede innovations that

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[532] *See LEC Regulatory Treatment Order* ¶ 159.

[533] *Id.* ¶¶ 156-173.

[534] *See LEC/CMRS Safeguards Order* ¶¶ 37-63; *see also id.* ¶¶ 42-43 (defining "in-region" for purposes of the LEC/CMRS proceeding).

[535] AT&T Comments at 51-52; TRA Comments at 8; PanAmSat Comments at 5.

[536] AT&T Comments at 51-52.

[537] Sprint Comments at 26-27. Sprint states that the existence of international borders provides "a natural and straightforward basis" for structural separation. Sprint supports requiring a separate corporate entity, separate books and accounts, a requirement that the U.S. affiliate deal on an arm's length basis with the foreign affiliate, and a requirement that the foreign affiliate not disclose carrier information received from the U.S. affiliate's competitors. *See* Sprint Comments at 27 n.32.

[538] *See* GTE Reply Comments at 29 (arguing that structural separation requirements should be narrowly constructed to address a specific concern, because otherwise they are burdensome for no legitimate purpose); BTNA Comments at 4 (arguing that structural separation should be imposed in extraordinary circumstances as a remedy against proven anticompetitive conduct); U S WEST Comments at 10 ("Structural separation is an onerous requirement that should be imposed only if there are clearly articulated anticompetitive concerns which cannot be resolved with the adoption of less intrusive regulatory measures."); *see also* NTT Reply Comments at 4.

would lower prices and create new ways of organizing the supply and distribution of international communications services."[539]

257. We find it necessary to require as a dominant carrier safeguard a minimal level of structural separation between the U.S. international carrier and its foreign carrier affiliate that possesses market power in a foreign market for international services. We find that more stringent requirements are unnecessary and could pose a significant burden on foreign-affiliated carriers that operate in the U.S. market. We find that the same concerns that led the Commission to impose a separation requirement on incumbent independent LEC provision of in-region interstate interexchange and international service and incumbent LEC provision of in-region CMRS also apply to the provision of U.S. international service by a foreign-affiliated carrier to a destination market in which its affiliate has market power. We find that discrimination, cost misallocation, and the possibility of a predatory price squeeze by such a foreign-affiliated carrier has the potential to cause substantial harm to consumers, competition, and production efficiency in the U.S. international services market. We therefore adopt a separation requirement generally consistent with that which we apply to incumbent independent LEC provision of in-region interstate interexchange and international service[540] and incumbent LEC provision of in-region CMRS.[541] We require a foreign-affiliated U.S. international carrier, regulated as dominant, to provide service in the U.S. market through a corporation that is separate from the foreign carrier affiliate, maintain separate books of account, and not jointly own switching and transmission facilities with its foreign carrier affiliate. We find that these requirements will not pose a significant burden on such carriers because most foreign-affiliated carriers operating in the United States do so in a manner that is consistent with the requirements we adopt here.

258. We find that price and non-price discrimination by a foreign carrier in favor of its U.S. affiliate has the potential to disadvantage an unaffiliated U.S. international carrier, and could hurt U.S. consumers. Our safeguards that apply to incumbent independent LEC provision of in-region interstate interexchange and international service and incumbent LEC provision of in-region CMRS are aimed at preventing discriminatory conduct by requiring that service be provided to an affiliate at tariffed rates, terms and conditions, pursuant to an approved interconnection agreement, or, in the case of incumbent LEC provision of in-region CMRS, on a compensatory arms-length basis, consistent with the Commission's affiliate transaction rules.[542] Discrimination in pricing and provisioning is also a

[539] Telia NA Reply Comments at 9; *see* SBC Reply Comments at 2-3 (arguing that the Commission should not adopt rules that are "prophylactic and unfocused," but rather respond to specific instances of misconduct); *see also* U S WEST Comments at 8-10; NYNEX Reply Comments at 1-3.

[540] *LEC Regulatory Treatment Order* ¶¶ 144-175; *see also Fifth Report and Order*, 98 FCC 2d 1191. In the *LEC Regulatory Treatment Order*, the Commission required such carriers to maintain separate books of account, not jointly own switching and transmission facilities, and acquire any services from its affiliated exchange companies at tariffed rates, terms, and conditions, or pursuant to an interconnection agreement negotiated pursuant to Section 251 of the Act. *LEC Regulatory Treatment Order* ¶¶ 158-167.

[541] *LEC/CMRS Safeguards Order* ¶¶ 37-63.

[542] *See LEC Regulatory Treatment Order* ¶ 163; *LEC/CMRS Safeguards Order* ¶¶ 38, 55-56.

potential concern in the market for international services in that the carrier with market power in the upstream input market can raise the costs of its downstream rivals by discriminating in pricing or by providing a lower quality of service to its rivals.[543]

259. In general, we find that our provisioning and maintenance reports and our No Special Concessions rule will guard against instances of non-price discrimination, and our No Special Concessions rule and the International Settlements Policy (ISP) will guard against price discrimination.[544] Also, our proportionate return policy ensures that U.S. carriers receive back return traffic in the same proportion that they send to a foreign carrier.[545] In addition, our contract filing requirement in Section 43.51 of the Commission's rules enables us to detect instances where carriers enter into arrangements that are inconsistent with our rules and policies.[546]

260. We are concerned, however, that, absent a structural separation requirement, a vertically integrated carrier operating in U.S. and foreign markets could potentially circumvent our rules. A single corporate entity providing services in the U.S. market that owns facilities on each end of the international route would be not be subject to our Section 43.51 contract filing requirement or our No Special Concessions rule. We also find that our requirement that a U.S. international carrier and its foreign affiliate not jointly own switching and transmission facilities, together with our separate affiliate requirement, will help ensure that there is sufficient transparency to determine whether the foreign carrier has discriminated in favor of its affiliate in violation of our rules and policies.[547]

261. We also find that cost misallocation by a foreign-affiliated carrier has the potential to harm competition in the U.S. market for international services. The Commission, in the *LEC Regulatory Treatment Order*, has expressed two concerns about cost misallocation by incumbent independent LECs providing in-region interstate interexchange and international service.[548] It noted first that, a carrier with market power in the upstream exchange and exchange access markets has the

[543] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); *see also supra* Section V.A.

[544] *See infra* Section V.C.2.b.(v) (adopting quarterly provisioning and maintenance reports for dominant foreign-affiliated carriers); *supra* Section V.B.1 (modifying the No Special Concessions rule); *Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

[545] *See Flexibility Order*, 11 FCC Rcd at 20,089-90 ¶¶ 63-67.

[546] 47 C.F.R. § 43.51.

[547] *See supra* Section V.B.1.

[548] *See LEC Regulatory Treatment Order* ¶ 103.

ability and incentive to use ratepayer revenues to subsidize its competitive operations in the downstream interstate interexchange and international services markets. This practice may allow the independent LEC to recover costs of its competitive operations from captive ratepayers in the upstream market, who, as a result, may face rate increases. Second, the Commission observed that cost misallocation may also distort competition in the competitive downstream market by allowing the vertically integrated carrier to charge a lower price than its rivals, which is made possible by a subsidy from captive ratepayers, rather than by greater production efficiencies.[549] The Commission's requirement of separate books of account and the prohibition on joint ownership of switching and transmission facilities is intended to detect and deter such conduct.[550] Although it is not within the Commission's statutory mandate to protect foreign ratepayers from use of ratepayer revenues to subsidize a foreign carrier's U.S. operations, we find that cost misallocation by a foreign-affiliated international carrier can distort price signals in the U.S. international services market and, under certain circumstances, give the affiliate an unfair advantage over its competitors.[551]

262. We find that the requirement we adopt here that a foreign carrier provide service in the U.S. market through an affiliate with separate books of account and separate switching and transmission facilities is necessary to assist the Commission in identifying instances of cost misallocation more easily. The requirement that the U.S. and foreign affiliate maintain separate books allows the Commission to identify when improper allocation of costs might harm competition in the U.S. market. This might occur, for example, if the inter-affiliate price for goods or services paid by the U.S. affiliate to the foreign affiliate appears to be far below the prevailing market price.[552] The requirement of separate switching and transmission facilities also prevents undetected cost misallocation by subjecting any arrangement for the use of foreign facilities or services by the U.S. affiliate to the Commission's contract filing requirement.[553] We also find that our No Special Concessions rule will also prohibit special arrangements that would constitute an improper allocation of costs.

263. We clarify that, consistent with the traditional practice of dividing an international circuit into U.S. and foreign halves, we consider U.S. and foreign half-circuits to be separate facilities for the purposes of our requirement that a dominant foreign-affiliated carrier operating in the U.S. market not jointly own switching and transmission facilities with its foreign affiliate. A U.S. carrier and its foreign affiliate are not, however, precluded from entering into a correspondent relationship or

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[549] *See id.* ¶¶ 103, 108.

[550] *Id.* ¶ 163.

[551] *Id.* ¶ 103.

[552] We note that our ability to effectively monitor a carrier's books to detect a cross-subsidy is impeded in the international services context because the foreign affiliate's books are not readily available to the Commission. *But see* 47 U.S.C. § 218.

[553] *See* 47 C.F.R. § 43.51.

otherwise jointly provisioning international transmission facilities. A U.S. dominant, foreign-affiliated carrier is also not precluded from entering into an agreement to provide service over the foreign affiliate's facilities, as long as the arrangement entered into by the U.S. and foreign affiliates is filed pursuant to the Commission's rules and made available to other U.S. international carriers, pursuant to our No Special Concessions Rule.[554]

264. Although we recognize that there may continue to be a danger of a predatory price squeeze from a foreign-affiliated carrier,[555] we do not find that a requirement that foreign-affiliated U.S. carriers take service at tariffed rates, terms and conditions is necessary or practical in the international services context. We currently require that all U.S. carriers file with the Commission contracts entered into with foreign carriers.[556] These contracts are made publicly available in the International Bureau's reference room. In addition, our No Special Concessions rule prohibits a U.S. international carrier from accepting any special concessions granted by a foreign carrier with market power.[557] We find that these requirements are sufficient to ensure that transactions affecting the provision of basic telecommunications service between the U.S. and foreign affiliate are conducted in a transparent and nondiscriminatory manner. We also find, as a practical matter, that many foreign carriers do not tariff international services in the same manner as we require of U.S. carriers. Since U.S. carriers are already prohibited from accepting a special concession from a foreign affiliate with market power and are required to file their contracts with the Commission, we do not find that it is necessary at this time to require a dominant U.S. international carrier to take service from its affiliate

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[554] *See id.*; *see also supra* Section V.B.1.

[555] In the *Benchmarks Order*, we found that foreign affiliated carriers operating in the United States on a facilities-basis have the incentive and ability to engage in a price squeeze. We found that while the benchmark settlement rate condition on facilities-based entry by a foreign carrier would aid in the prevention of a price squeeze and protection of competition in the U.S. market, it would not completely eliminate a foreign-affiliated carrier's incentive and ability to engage in a price squeeze. *Benchmarks Order* ¶¶ 213-218, 222. We also recognized in the *LEC Regulatory Treatment Order* and in the *Access Charge Reform Order* that an incumbent LEC's control of local exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze. *Access Charge Reform*, CC Docket 96-262, First Report and Order, FCC 97-158, ¶¶ 275-282 (rel. May 16, 1997) (*Access Charge Reform Order*); *LEC Regulatory Treatment Order* ¶ 161. In the *LEC Regulatory Treatment Order*, we found that the requirement that independent LECs providing interexchange service take service from their affiliates at tariffed rates, terms, and conditions would deter somewhat the risk of a price squeeze to the extent that an affiliate's long distance prices are required to exceed their costs for tariffed services. *Id.* ¶ 163.

[556] *See* 47 C.F.R. § 43.51.

[557] *See supra* Section V.B.1.

at tariffed rates, terms and conditions as we require for an independent LEC in its dealings with an interexchange affiliate.[558]

265. We adopt these separation requirements as a dominant carrier safeguard only, and do not apply them to all foreign-affiliated carriers because we do not have the same concerns with foreign carriers that lack foreign market power. Such carriers are unlikely to have the ability to harm competition in the U.S. market even if they do engage in cost misallocation or discrimination, and would be unable to engage in a predatory price squeeze because they lack sufficient foreign market power. In addition, as discussed in our No Special Concessions section, allowing non-dominant international carriers to engage in certain exclusive arrangements with foreign carriers may have procompetitive benefits.[559]

266. Telia NA, SBC, and others argue that we should decline to adopt a structural separation requirement because it would impede innovation and that the Commission instead should seek to promote, rather than preclude, "innovative commercial arrangements that will lower the cost of international telecommunications services."[560] SBC argues that instead of applying structural separation, we should rely on our complaint process or on rules adopted in a later proceeding. As discussed above, we find that some structural separation is warranted to prevent anticompetitive conduct and also to ensure that our reporting requirements and No Special Concessions safeguards are effective.[561] Moreover, we find that the minimal separation requirement we adopt here will neither impede innovation nor preclude innovative commercial arrangements because foreign-affiliated carriers, for the most part, already provide service in a manner that is consistent with the rules we adopt here. Currently, almost all foreign-affiliated carriers that are regulated as dominant and operating in the U.S. market maintain separate corporate affiliates in the United States and the foreign country.[562] Because such entities generally maintain separate corporate entities, switching and transmission facilities are generally separate as well. Further, as an entity operating in the U.S. market, it is in a foreign carrier's interest because of tax implications to maintain books of account to reflect the income of its U.S. operation separately from its foreign operation. Finally, to the extent that a foreign-affiliated carrier finds these requirements do indeed hamper its operations, and believes such integrated operations do

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[558] *See LEC Regulatory Treatment Order* ¶¶ 144-175. That order also allows an independent LEC to provide services to its interexchange affiliate under an interconnection agreement negotiated under Section 251 of the Act. *See id.* ¶ 164.

[559] *See supra* Section V.B.1; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶¶ 257-258.

[560] Telia NA Reply Comments at 9; *see also* SBC Reply Comments at 2-3; U S West Comments at 8-10; NYNEX Reply Comments at 1-3.

[561] *See supra* ¶ 260.

[562] We note that Telecom New Zealand Ltd., a corporation incorporated in New Zealand, was recently granted international Section 214 authority, but has yet to begin providing service. *See Telecom New Zealand Limited*, File No. I-T-C-96-097, DA 96-2182 (rel. Dec. 31, 1996).

not pose a potential threat to competition in the U.S. international services market, we are open to requests to waive these rules.

267. Telia NA also argues that we should not apply structural separation to dominant foreign-affiliated carriers operating in the U.S. market because it would be inconsistent with the Commission's treatment of out-of-region interexchange operations of BOCs and incumbent independent LECs, which are regulated as non-dominant and are not subject to structural separation for such services. It argues that since carriers originate traffic for both services outside the region where they control bottleneck facilities, the Commission should regulate both classes of carriers similarly. Although both kinds of carriers do lack market power in the originating market, we find that there are significant differences between the two types of carriers that preclude identical regulatory treatment. Our decision to remove the separation requirements that applied to BOCs and independent LECs prior to adoption of the *LEC Regulatory Treatment Order* rested in large part on our conclusion that there are minimal concerns of discrimination and cost misallocation due to regulatory oversight of the LEC along with geographic separation when the LEC provides interstate interexchange service on an out-of-region basis.[563] As discussed above, we find that a foreign carrier's ability to control foreign terminating facilities and services, over which we lack direct regulatory oversight, poses a risk of discrimination in the provision of U.S. international services that could harm competition in the U.S. market. As discussed in section V.B.1., our No Special Concessions rule is an important safeguard in preventing discrimination by a foreign carrier with market power in the foreign market. Our reporting requirements are also an important means of ensuring transparency in relations between U.S. and foreign carriers. Without a separation requirement, these rules would be less effective at detecting and deterring anticompetitive conduct.[564] Moreover, our limited regulatory oversight over the foreign carrier's books of account reduces our ability to detect cost misallocation. As discussed above, we find that our minimal separation requirements will aid in addressing those concerns. We therefore do not find that foreign-affiliated carriers that offer U.S. international service to an affiliated market are sufficiently similar to the BOCs and incumbent independent LECs providing out-of-region interexchange service to accord them identical treatment.

268. We note that AT&T and PanAmSat urge us to adopt a detailed structural separation requirement as a part of our supplemental dominant safeguard proposal in order to guard against improper cost allocation.[565] Although we decline to adopt a second tier of supplemental dominant

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[563] *See LEC Regulatory Treatment Order* ¶¶ 206-213 ("we believe that other applicable safeguards [than a structural separation requirement], coupled with the geographic separation between the BOCs' and independent LECs' in-region and out-of-region operations will prevent a BOC or independent LEC from favoring its out-of-region interexchange services through improper allocation of costs, discrimination, or other anticompetitive conduct.")

[564] *See supra* ¶ 260.

[565] AT&T Comments at 51-52; PanAmSat Comments at 5.

carrier safeguards,[566] we address AT&T's comments here as they are relevant to structural separation. AT&T argues that the foreign affiliate should be required to operate as a distinct entity with separate officers, directors, and employees, to maintain separate accounting systems and records identifying all payments and transfers from the foreign carrier and to receive no subsidy from the foreign carrier or any investment or payment not recorded as investment in debt or equity.[567] AT&T also urges the Commission to require carriers subject to "supplemental dominant carrier regulation" to submit to detailed affiliate transaction rules.[568]

269. We find that these types of detailed separation requirements are unnecessary at this time to guard against discrimination and cost misallocation and could create unnecessary inefficiencies on foreign-affiliated carriers operating in the U.S. market. We find that the dominant carrier safeguards we adopt here will help to guard against such conduct without being overly burdensome. Adopting AT&T's proposed separation requirements could significantly impede a foreign-affiliated carrier from engaging in "innovative commercial arrangements" that could stimulate competition in the U.S. international services market. Requiring separate officers, employees, and directors would preclude a foreign-affiliated carrier from taking advantage of economies of scale and scope that could allow it to provide better service at lower cost to consumers. AT&T urges the Commission to adopt detailed monthly reporting requirements, some of which we adopt here on a quarterly basis.[569] Adopting AT&T's proposal could pose a regulatory burden that we believe is unnecessary given the reporting requirements we adopt below. In short, we do not find that the benefits of AT&T's proposals outweigh the burdens they would impose on U.S. international carriers. We do find, however, that the measures AT&T advocates are the types of measures the Commission could impose on a foreign-affiliated carrier engaging in anticompetitive conduct in the U.S. market in order to ensure that further misconduct does not occur.[570]

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[566] *See supra* Section V.A.

[567] AT&T Comments at 51-52.

[568] *Id.* at 50 (requiring monthly reports showing prices, terms, and conditions of all products and services provided by a carrier's affiliate, including copies of all agreements, settlement rates and the methodology for proportionate return, details of provisioning and maintenance, including types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, average number of circuit equivalents and percentage of 'busy hour' calls that failed to complete. In addition, AT&T suggests requiring that all affiliate transactions be reduced to writing and that such records be subject to a recordkeeping requirement). We address these proposed requirements *infra* Section V.C.2.b.(v).

[569] *See infra* Sections V.C.2.b.(iv)-(vi).

[570] *See infra* ¶ 295.

(iv) Quarterly Traffic and Revenue Reports

270. We proposed in the *Notice* to adopt as a basic safeguard the existing requirement that dominant foreign-affiliated carriers file quarterly traffic and revenue reports.[571] AT&T and the Telecommunications Resellers Association support the reporting requirement but contend that the Commission should require more detailed information. In particular, AT&T suggests that the Commission should clarify that dominant carriers must separately report originating and terminating traffic and must report the number of minutes in each service category for which different settlement rates apply, as well as the number of minutes, separately identified, that are included and excluded from proportionate return.[572] Other commenters respond that AT&T's proposal is excessive and unnecessarily burdensome.[573]

271. We retain the requirement that foreign-affiliated dominant carriers file quarterly traffic and revenue reports for their dominant routes. We find that these quarterly reports aid in the detection of, and help deter, anticompetitive conduct. In particular, these reports provide us, on a timely basis, with the ability to determine the source of any deviations in traffic flows, such as the flow of return traffic a U.S. carrier receives from its affiliated carrier. They will complement the quarterly traffic and revenue reports required by the *Benchmarks Order*, which are filed by carriers with a notable amount of international traffic.[574] The *Benchmarks Order's* quarterly reporting requirement is intended to identify on a route-specific basis whether inbound switched traffic is being diverted from the accounting rate system to facilities-based or resold private lines.[575] Under that reporting requirement, carriers must file data only for their provision of switched facilities-based telephone services and their provision of switched telephone services over facilities-based or resold private lines. These reports indicate whether distortions are occurring but do not necessarily identify the source of such distortions.

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[571] *See Notice* ¶ 99.

[572] *See* AT&T Comments at 47-48.

[573] *See* MCI Reply Comments at 4 & n.7; Telia NA Reply Comments at 4; KDD Reply Comments at 7-8.

[574] The *Benchmarks* reporting obligations require common carriers to file traffic reports for each quarter in which their traffic meets any of the following thresholds: (i) their aggregate U.S.-billed minutes of switched telephone traffic exceeds 1 percent of the total of such minutes of international traffic for all U.S. carriers (as published in the most recent Section 43.61 traffic data report); (ii) their aggregate foreign-billed minutes of switched telephone traffic exceeds 1 percent of the total of such minutes of international traffic for all U.S. carriers; (iii) their aggregate U.S.-billed minutes of switched telephone traffic for any country exceeds 2.5 percent of the total of such minutes for that country for all U.S. carriers; or (iv) their aggregate foreign-billed minutes of switched telephone traffic for any foreign country exceeds 2.5 percent of the total of such minutes for that country for all U.S. carriers. *See Benchmarks Order* ¶ 251.

[575] In the *Benchmarks Order*, we adopted a presumption that competitive distortions exist if the ratio of outbound (U.S.-billed) to inbound (foreign-billed) settled traffic increases 10 or more percentage points in two successive quarterly measurement periods. *See id.* ¶ 249.

The quarterly reports we adopt here, however, will help determine the source of such harms if any exist on a particular route. For example, these reports may assist in determining whether an apparent loss of U.S.-inbound traffic on a particular route is the result of an affiliated U.S. carrier receiving a disproportionate amount of return traffic from its foreign affiliate.[576]

272. We recognize AT&T's assertion that more detailed information is necessary to detect and deter competitive harms in the U.S. international services market. On their dominant routes, U.S. carriers affiliated with foreign carriers that have market power on the foreign end currently are required to file quarterly reports on the number of messages and the number of minutes of both originating and terminating traffic.[577] As an initial matter, we amend this rule to require all dominant foreign-affiliated carriers to file for their dominant route a quarterly version of the annual traffic and revenue report that all U.S. international carriers file pursuant to Section 43.61 of our rules.[578] Given the development of alternative routing and settlement arrangements in today's global international services market, however, we find that a comprehensive review of the Section 43.61 annual reporting requirements would be more appropriate than the adoption of a separate reporting manual exclusively for dominant foreign-affiliated carriers. We therefore direct the Common Carrier Bureau, in consultation with the International Bureau, to review AT&T's request for more detailed information than currently is required in the Section 43.61 reporting manual and, if warranted, revise the manual to ensure that we obtain relevant information to assist in the detection of competitive harms in the U.S. market. We direct the Common Carrier Bureau to propose modifications to the Section 43.61 reporting manual.

273. We adopt here AT&T's proposal[579] to require dominant foreign-affiliated carriers to file all dominant carrier reporting information with the Commission's vendor and to mark these filings as responsive to the relevant filing requirement.[580] We agree with AT&T that this action would facilitate public access to these reports. We note here that we direct the International Bureau to examine whether to require the electronic filing of summaries of agreements subject to Section 43.51 of our

[576] As discussed above, we are also requiring that quarterly traffic and revenue reports be filed by switched resale carriers for any international route where they are affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end and that collects settlement payments from U.S. carriers. *See supra* ¶ 211. We note that switched resellers that provide such service on a particular route solely by reselling the switched services of unaffiliated U.S. facilities-based carriers are presumptively classified as non-dominant on that route. *See* 47 C.F.R. § 63.10(a)(4). We find, however, that the quarterly traffic and revenue we adopt above will assist us in detecting whether switched resellers are engaging in traffic distortion schemes on affiliated routes.

[577] *See* 47 C.F.R. § 63.10(c)(4).

[578] 47 C.F.R. § 43.61.

[579] *See* AT&T Comments at 52-53.

[580] *See infra* Appendix C (to be codified at 47 C.F.R. § 63.10(d)).

rules, a proposal in the *Notice*[581] that we decline to act on given the lack of comment or support in the record.

(v) Quarterly Provisioning and Maintenance Reports

274. We proposed in the *Notice* to adopt as a basic safeguard the existing requirement that each dominant foreign-affiliated carrier maintain complete records of the provisioning and maintenance of basic network facilities and services that it procures from its foreign affiliate, including, but not limited to, correspondent or other basic facilities procured on behalf of customers of joint venture offerings.[582] We sought comment on whether a recordkeeping requirement was sufficient and necessary to prevent discrimination. We also proposed that those carriers subject to supplemental dominant carrier regulation file quarterly reports summarizing their records of the provisioning and maintenance of facilities and services provided by their foreign affiliate.[583] In addition, we requested that commenters address the form and content of a provisioning and maintenance requirement.

275. AT&T supports retaining the existing requirement as a basic safeguard and recommends that it apply to all basic network services and facilities that may be jointly provided with a foreign affiliate.[584] AT&T contends, however, that the quarterly filing requirement for carriers subject to supplemental safeguards is not sufficient to protect against discriminatory behavior. AT&T asserts that these carriers should be required to file monthly, publicly available reports showing details of the provisioning and maintenance of all services and facilities provided, including the types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, for circuits used to provide international switched service, the average number of circuit equivalents available to the U.S. affiliate and the percentage of "busy hour" calls that failed to complete.[585] AT&T also proposes that U.S. affiliates

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[581] *See Notice* ¶ 108.

[582] *See id.* ¶ 103.

[583] *See id.* ¶ 108.

[584] *See* AT&T Comments at 48.

[585] *See id.* at 50; *accord* TRA Reply Comments at 7. In addition, AT&T seeks public disclosure of other information as well, such as the prices, terms and conditions of all products and services provided by its affiliated foreign carrier, including copies of all agreements, settlement rates and the methodology for proportionate return. It also suggests that all affiliated transactions be reduced to writing and that such records be subject to a recordkeeping requirement. *See id.* We find that our current filing requirements under Sections 43.51, 64.1001, and 64.1002 of our rules provide sufficient information with respect to affiliate transactions in light of the separate affiliate requirement adopted above. *See supra* Section V.C.2.b.(iii).